



Podcast Transcript

AD Nauseam: Name Games – When Branding Becomes a Claim

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Guest: Amy Mudge, Daniel Kaufman, **Host:** Connor Corbett

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For questions and comments contact:



Amy Ralph Mudge

Partner
Washington, D.C.
T: +1.202.861.1519 | amudge@bakerlaw.com



Daniel Kaufman

Of Counsel
Washington, D.C.
T: +1.202.861.1523 | dkaufman@bakerlaw.com

Corbett: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Connor Corbett, your new host of AD Nauseam, and you're listening to BakerHosts. We are once again joined by Amy Mudge and Daniel Kaufman from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives.

On today's episode of AD Nauseam, Amy and Daniel explain when trade names can be treated as advertising claims and challenged as misleading, focusing on how the FTC and NAD handle expressly false versus implied claims. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel for this week's episode.

- Kaufman: Amy, you know that we love our iconic advertising here at AD Nauseum, and nothing is more iconic than a good name and a good logo.
- Mudge: Absolutely. And Daniel, today we're going to discuss, though, how not even trade names are immune from claims of false advertising. But before we dive into this topic, speaking of icons, very sadly, we lost one recently. I was absolutely gutted to hear of Catherine O'Hara's passing at age 71. We spent, as a family this brutally cold D.C. weekend, we enjoyed Waiting for Guffman and For Your Consideration. I know you're a Catherine O'Hara fan too, so what are some of your favorites?
- Kaufman: Yeah, her passing, that one really hurt. But look, I've got a lot of favorites. But recently, I really loved the kickoff of The Studio. Her first interactions with Seth Rogen were just amazing. But looking back at some of the Schitt's Creek moments, two of my favorites, which were just amazing, was, of course, her officiating the wedding, which was fabulous. And I loved during the episode about performance of Cabaret, where she has that heart-to-heart with Stevie, where she lifts her up and has this amazing discussion with her. And it is just, some of them were funny, some were touching, but she was just one-of-a-kind. How about you, Amy?
- Mudge: Well, absolutely. I feel like if we leave our listeners with anything, it is go digest the entire catalog of Catherine O'Hara. I love Seth Rogen's tribute to her when he said he just tried to create a TV show that was worthy of her. I think indeed he did, with all the awards for that show flowing in. I have to say, I liked her heartfelt moments on Schitt's Creek, but I love her stupid stuff. And I still, my family bought me a t-shirt, Ertlinger's Fruit Wine, the television commercial she did, where she was getting drunker and drunker and just couldn't say it. It was like, literally, I was crying, absolutely crying. So, I really do hope our audience takes in Schitt's Creek in its entirety, takes in all the Christopher Guest movies and everything else she has done.
- Kaufman: Yeah, I know. She brought a lot of joy to a lot of people, but the work must go on. So, Amy, let's get back to trade names. We get asked the question a lot about whether trade names are entitled to any special protection from false advertising challenges, an important issue. And at the FTC, over the years, well the answer is no, if a name contains anything false. How about at the NAD?
- Mudge: Well, the answer there is the same, and if a name is expressly false, on its face, NAD will recommend a name change. Now, if the name is impliedly false or misleading, but subject to a couple of different interpretations, NAD will not do its usual thing to, quote/unquote, step into the shoes of the reasonable consumer. In the case of a trade name, NAD will give the benefit to the advertiser in such cases, and they're only going to recommend a name change to an impliedly misleading name if the challenger provides good consumer perception evidence that shows actual consumer confusion.
- Kaufman: Yeah, it does surprise me how many people believe that if a mark is trademarked, it is protected from such challenges. But we get this question not

infrequently. And look, in NAD cases, when a trade name is challenged, often advertisers will try to defend it, saying it is a trade name, not a claim. But of course, it can be both.

Mudge: Absolutely. But before NAD got into this, I know we've got some very classic FTC history. What are some of the older cases at the FTC, Daniel, that required what is called a trade name excision?

Kaufman: Oh it is classic and classy, Amy. Well, let's go back to the 1960s. We've got the Continental Wax Company, which had to remove the word wax from its name as the products did not in fact contain wax. In the 1990s, ABS Tech Systems had to stop using ABS in its name because its products did not have anti-lock brake systems. And more recently, in 2019, the FTC did require Truly Organic to change its name because its products were not, in fact, organic according to the FTC.

Mudge: Now, we don't have too many examples of this as a remedy, however. Why not?

Kaufman: Well, the Supreme Court in 1946, in the case of *Jacob Siegel versus the FTC*, recognized that intellectual property rights were important. And while the FTC would order a change of a trade name, it really had to be only a last resort, when trade name excision was the only remedy that could adequately protect consumers.

Mudge: It is relatively rare at NAD, but companies will certainly be willing to take a shot at getting their competitors to change the name. We did recently, it is, I'll call it a fairly back-of-the-envelope survey of NAD cases where a company asked NAD to require a trade name. And looking at about 60 cases from the late '90s forward, we found that in about 25% of these cases, NAD did in fact recommend a change to the product name. Maybe not complete abandonment of it, but at least a change. And this was in cases where the NAD did find that there was an expressly false claim that needed to be changed by a change of the trade name itself.

Kaufman: 25% sounds pretty high. What is up with that? Tell us more, Amy.

Mudge: I had the same thought. First, I do think that challengers recognize this is an extraordinary remedy, and so maybe don't raise it quite so often. At NAD, some days you're a challenger, some days you're an advertiser. So, I think there is some honesty amongst advertisers to say, look, I don't, but for the grace of God go I. So I do think it is not something that challengers raise willy-nilly. And, second, there often is a threshold determination that NAD needs to make as to whether what is being challenged is actually a trade or a product name, or whether it is just a descriptor of the product, okay? So, the cases I was looking at were cases involving true trade names and cases where presumptively the trade names would get potentially a greater protection.

If we're just talking about a product descriptor, there is no particular deference to those. I mean, NAD treats challenges there just the way they would any other

claim challenge. I also didn't include in the 60 cases, there were a few examples, not too many, where there was a challenge to the trade name, but where the challenger submitted survey evidence that NAD credited showing consumer confusion. I set those guys aside. But it is still, of those 60 cases or so where NAD did say, yep, this is a claim in the trade name, again, about 25% of the time, they said the name itself has one of those false claims that we just need to see changed.

Kaufman: So, has NAD been consistent over time on this issue?

Mudge: My sense in looking at the cases is that NAD in the last decade or so has been a bit more willing to find a trade name includes an expressly false claim. So perhaps there is maybe a little bit less deference to advertisers than there might have been back a couple of decades ago but I'm leery to say that because the specifics of the names that are challenged really, really matter.

Kaufman: Yeah, and Amy, it is funny, it is such an interesting area. So, can you give us some of those examples where a product name was deemed to be an expressly false claim?

Mudge: Yeah, I do think examples are going to help our listeners understand where these lines are. So one example was a product called Rx Sugar, alright? And that was the product. The challenger went after Rx Sugar saying two different things. It said, one, this product is not a drug, and Rx suggests it is a drug, and also, it is not sugar, and Rx Sugar says it is sugar. In this case, NAD did recommend a change to the trade name. They recommended that they remove sugar from the name, okay, because they found you can't call a product sugar. It is not sugar. But, they said that the Rx reference by itself did not clearly communicate that something was a drug. I found that one pretty interesting.

But got some other ones where the lines are not as finely drawn. Supplement cases. NAD recommended a product called Dakota Elderberry Products remove reference to elderberry in the name because the products didn't have enough elderberry to be efficacious at all. Or with I Health Culturelle IBS Support, NAD recommended that IBS be removed from the name because there wasn't adequate substantiation that the product treated IBS. Same with TummyZen Total Heartburn Relief. NAD recommended total heartburn relief be removed from the name as there wasn't support that the product could provide this level of relief. Another example, maybe this is obvious, Irwin Green Tea Fat Burners. We all know about green tea and fat burning. And in this one, NAD said, no, the reference to fat burner in their name has to go.

Kaufman: Yeah, the examples really do drive it home. And maybe a good example of the NAD FTC line is the NAD challenge to Fungi Nail. NAD recommended the name be changed because there was no support that the product could treat nail fungus. And the company did take a referral, and when the FTC reviewed it, the FTC allowed the company to keep the name, but only when it committed to making some real significant changes to its labeling and advertising in order to make it clear that it was not a treatment for the condition. But generally, we've got

lots of examples, certainly in the health and wellness product arena involving naming.

Mudge: Yeah, I think that is, I don't know how much to draw from that as to whether the NAD is more exacting than the FTC, because I think we have exactly that one single example. But it does go to that idea of is there anything before the FTC requires a trade name change that '40s case you referenced to say, is there anything else we can do? And in this case, I guess the FTC thought they could.

But another category where we see NAD has recommended name changes, just on the face of the name, is when the name includes a quantification, a number that it finds that the advertiser hasn't supported. So, a couple of examples are Rust-Oleum Painter's Touch Ultra Cover 2X Spray Paint. And the NAD said there wasn't support for that twice the coverage of the spray paint so recommended that 2X be discontinued. And similarly, there was an Arm & Hammer 2X Concentrated Laundry Detergent case where NAD recommended that the 2X be discontinued because there wasn't a showing that it was that sufficiently concentrated. And in Cyber Defender Double My Speed PC Software Optimizer, in that case, the company just agreed voluntarily to get rid of the reference to double my speed.

Kaufman: Yeah, look, a name change is a big deal, but what are some examples where NAD thought about it and did not require a name change?

Mudge: Yeah, there are lots of these. And unfortunately, probably there is lots of times the FTC thought about it, but of course those are usually memorialized, right, in cases. And so we got to look to the NAD for this. Lots of classics, lots of examples. A more recent one was a challenge to the trade name Zarbee's Naturals. NAD said they can keep reference to natural in the name, but they had to use more clarifying descriptors to avoid implying that the whole line of products that they sold was all-natural.

Other examples are when NAD found that trade names, they're hyperbole. Consumers wouldn't look at the name as a true product performance. And some examples of this are Kraft All Out Squeeze for some condiments. Maybe you're not going to get every little drib and drab out in the condiment, but NAD said, come on, All Out Squeeze is a fine name. Hefty Odor Block. Okay, these are trash bags where there was some protection against odors, odors were not literally blocked. But again, NAD said a name like this is a bit hyperbole. Similarly, Luvs with Nightlock. Maybe you're not going to have a diaper that is going to 100% keep you dry all night long, but Nightlock was a fine name. Similarly, Crest Sensi Stop Strips. These are those whitening strips. They said, look, people are not going to expect there to be no sensitivity when you use white strips. We're going to allow Sensi Stop. And another one is Ninja Foodi Never Stick. Come on. Food is going to stick to pans sometimes. That is another hyperbole. And last, another one I liked was IDIA Never Snore. You're going to snore sometimes.

There are a number of cases too where there were adjectives in the name, alright? And NAD usually allows those. So, examples like Pepto Bismol Ultra, Sprayaway World's Best Glass Cleaner, Zicam Ultra Cold Remedy. Those names were all allowed to stand. There are also a number of cases where there is some reference to green or eco in the trade name that NAD has allowed and hasn't gone so far to find that these trade names alone convey an unsupported, unqualified, broad environmental promise. So some examples like Green Pan, Safe Catch Tuna, Epson EcoTank Printers, Tide Pureclean, Pamprin Botanicals, these were all names without any showing of survey evidence that consumers were confused. These were all names that NAD allowed to stand.

Kaufman: One of my favorites is that NAD considered a challenge to the name Costco Wholesale, saying it was not really a wholesaler. Needless to say, NAD did allow them to keep their name. So, I think we're seeing some pretty clear guidance emerging here. If the name has a manifestly false promise, it shouldn't be used, particularly in the health and wellness context. If your product does not treat a particular condition, it shouldn't be in the trade name.

Mudge: Absolutely, Daniel. But then again, fanciful terms, adjectives, bragging words, these sorts of things in a trade name are probably going to be fine.

Kaufman: And the occasional overblown performance words might be okay, as long as in that context, consumers are going to get that they're hyperbole.

Mudge: But of course, think long and hard about this, because changing a trade name or a product name, I mean, it could be lights out for a company and also require complete relabeling and complete rebranding. So this may be another reason we don't see a lot of these cases is probably from the get-go, folks are maybe more cautious about selecting an appropriate trade name.

Kaufman: Yeah, and if you're a challenger who wants to go after a competitor's name, it is a really good idea to invest in quality consumer survey work to better your chances that NAD will give you the remedy that you're seeking. Going in arguing the name is an expressly false claim that is not subject to an innocuous takeaway is going to be an uphill battle.

Mudge: Yeah, but do remember, your trade names and product names and logos are all subject to attack as potentially being false or misleading claims, and that getting clearance from the patent and trademark office is not going to give you any defenses before the FTC or the NAD.

Kaufman: Well, thank you, Amy. That was some really fascinating information and guidance. And as always, we thank everyone for joining us for the latest episode of AD Nauseam.

Mudge: And that is a wrap. See you next time.

Corbett: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest

developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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